IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 603.

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR,

Petitioners,

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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OPINIONS BELOW.

The Report and Findings of the Director of the Bituminous Coal Division are contained in the Record at page 532 and the opinion of the Circuit Court of Appeals for the Fourth Circuit, reported in 114 F. (2d) 752, at pages 573-580 of the Record.

THE QUESTIONS PRESENTED.

The skeleton statement of petitioners under this heading (Brief, p. 2) is inadequate and erroneous in several respects.

The statement that the railroad (represented by the Receivers) made a contract with a "coal producer" for the mining of their coal assumes the answer to one of the principal issues in the case. Respondents deny that the contractors whom they engaged to extract their coal are "producers" within the meaning of the Act. The contractors merely mine the coal for the respondents, and respondents are the producers in that production of the coal is within their exclusive dominion and control.

It is next asserted that under the contracts the producer "was to assume, and indemnify the railroad against, all liabilities, burdens and risks attendant upon the coal mining business." The facts, as disclosed by the record without dispute, are that while the contractors did assume certain liabilities and risks in the first instance and toward third parties, the railroad is bound under the contracts to reimburse the contractors for every cost of operation which is not within the control of the contractor. The burdens and risks of the operations are therefore in the final analysis actually upon the railroad and not in any real sense upon the contractor. Both the motivating power behind the extraction of the coal and the entire financial responsibility of paying the costs belong to the respondents.

The bare facts are that the railroad leased certain lands or the mineral rights therein, and simultaneously engaged the services of contractors to mine and load the

coal in amounts as directed by the railroad. Compensation, including all cost of operation, is paid to the contractors and royalties are paid by the railroad to the landowner. All the coal mined by the contractors is consumed by the railroad in its operations. The contractors have no right, title or ownership in the coal and there are no relationships between any of them and the respondents other than under the written contracts shown in the record.

The question is whether the operations carried on by the contractors under the general direction and control of the respondents are within the scope of the Act, and whether, therefore, the compensation which the contractors receive for their services can be regulated—*i. e.*, increased—by reference to the prices for similar coals fixed for the commercial market under the price-fixing machinery of the statute.

The determination of this issue involves the following questions:

> I. Whether the price-fixing and related provisions of Section 4-II of the Bituminous Coal Act apply only to coal or transactions in coal in which a sale or other transfer of title to the coal by the producer thereof occurs.
>
> II. A subsidiary issue is raised as a preliminary to the review of the Director's decision that respondents are not producers of the coal within the meaning of Section 4-II(1), by the petitioners' contention that the Director's determination on the point is final.
>
> III. If Section 4-II applies generally to coal and transactions in coal in which no sale or other transfer of title to the coal by the producer is

involved, whether the coal produced at the respondents' mines is consumed by the producer within the meaning of the exemption in Section 4-II(1).

IV. Whether the provisions of Section 4-II, if applied to the coal produced at these mines and the transactions disclosed by the record, are constitutional and valid.

Petitioners refer in their statement of the questions presented to the second of these issues only. The question whether the coal is consumed by the producer within the meaning of the express statutory exemption cannot arise until it has been determined whether the Act as a whole has any field of operation in the situation disclosed by this record. Respondents say that the Act has no application here no matter who is called by the name "producer," because there is no sale or other transfer of title to the coal by either the railroad or the contractors.

The Director concluded as a matter of law that the Act applied here because the service of the contractors in mining the coal and loading it on cars was a "matter or transaction in interstate commerce" within the purview of the statute (R. p. 551). He also concluded that the respondents were not the producers of the coal and hence not entitled to exemption under Section 4-II(1), because "not engaged in the business of mining coal" and on the ground that the definition of the term "producer" contained in Section 17(*e*) of the Act is all-inclusive. (R. pp. 547, 549).

The Circuit Court of Appeals reversed the order of the Director upon the grounds:

(a) That Section 4-II of the Act relates and applies only in case a sale or other transfer of title to the coal *by the producer* is involved;

(b) That in the case at bar no sale or transfer of title to the coal in question *by the producer* was involved; and

(c) That respondents are both the producers and consumers of the coal within the meaning of Section 4-II(1), and that the Director's decision was not supported by substantial evidence and was based upon error of law.

It was accordingly unnecessary for that court to consider or determine the constitutional question referred to in IV above.

THE STATUTE INVOLVED.

The statute involved is the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72-91, U. S. C. Supp. V, Title 15, secs. 828-851.

The Act is an extensive document, and since petitioners state that they will hand copies to the Court on the argument, it is not reprinted in this brief.

The parts of the Act directly involved are Sections 4-II and 4-A, which contain the substantive regulatory and price-fixing provisions, the basic issue being whether or not these regulatory provisions apply only to commercial transactions in coal in which a sale or transfer of title to the coal by the producer occurs. The tax provisions of Section 3 are also pertinent to the determination of this issue.

A separate but related issue is whether or not if Section 4-II is not so limited in its application, the coal produced at respondents' mines is nevertheless expressly exempted from the price-fixing and other regulatory provisions, by Section 4-II(l):

> Sec. 4-II(l). The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

It is asserted by petitioners, and denied by respondents, that the language of Section 17(c) throws light on the second question:

> Sec. 17.—As used in this Act:
>
> (c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

The language of Sections 4-A and 6(b) is involved in the petitioners' argument that the determination of the Director upon the second issue above stated is not reviewable.

STATEMENT OF THE FACTS.

The record discloses no conflict of testimony. All evidence was candidly given by witnesses for the Railway and its truth has not been challenged. The case involves merely the proper interpretation of the statute as applied to the basic and undisputed facts.

Respondents, as Receivers of the properties of Seaboard Air Line Railway Company, in order to

insure an adequate and constant supply of coal for the railroads committed to their charge, as well as to save money in the event of future increases in the price of coal on the commercial market, in 1934 and 1935 by instruments of conveyance, which have been successively extended and renewed, acquired by grant from the owners of coal-bearing lands the sole and exclusive right to take coal from the lands at the three mines, namely, the William-Ann mine in Mingo County, West Virginia, the Chilton Block No. 1 mine in Logan County, West Virginia, and the Glamorgan mine in Wise County, Virginia. Concurrently respondents engaged under the respective contracts (R. pp. 27, 30, 34, 182, 256, 293, 324) D. H. Pritchard and Peerless Coal Corporation—skilled mine operators—to perform for respondents the work and service of extracting and loading on cars at the mine the coal so acquired (R. pp. 27, 30, 34, 182, 251, 293, 324). In each case the right and title to the coal was acquired by respondents from the fee owners of the land on the usual royalty basis whereby respondents pay royalties to the landowners at a fixed rate per ton for all coal mined and are obligated in any event to pay minimum royalties in amounts totaling some $29,000 per annum whether any coal is extracted or not (R. p. 545).

All of the coal involved is owned by respondents, is shipped by respondents to themselves and consumed by respondents (R. pp. 37, 47, 50, 67, 82, 83, 110, 117, 533, 545). The contractors have or claim no title or interest in the coal either before or after severance, and no right or power of sale or of other disposition of the coal. The *jus disponendi* thereof vests solely in respondents. (R. pp. 87, 97, 534, 539, 543). The coal is mined, loaded and shipped only as and when re-

spondents instruct the contractor (R. pp. 108, 534, 539, 543, 545). Respondents derive their title to the coal by grant from and in direct privity with the owners of the coal-bearing lands as follows: at the William-Ann mine from United Thacker Coal Company and the Cole & Crane Trustees; at the Chilton Block No. 1 mine from Dingess-Rum Coal Company, and at the Glamorgan mine from Glamorgan Coal Land Corporation. Neither the respondents nor either of the contractors has any stock or other interest in or control of the landowners. All of the parties to the transactions are separate legal entities, each is independent of the others and there are no interlocking relationships through directorships, stock ownerships or otherwise (R. pp. 68, 86, 126, 547).

The grant to respondents by United Thacker Coal Company and the Cole & Crane Trustees was made after operation of the William-Ann mine by the William Ann Company, the former lessee of the coal lands, (referred to in the marginal note on page 5 of petitioners' brief) had ceased and determined and after the lessors had repossessed the leased properties and acquired title by recapture to the mining equipment and other property formerly of the William Ann Company following default by the latter company under such former lease provisions (R. p. 64).

In the case of the Chilton Block No. 1 mine title to the coal is derived by respondents not by sub-lease from Chilton Block Coal Company but as lessee of Dingess-Rum Coal Company, the landowner (R. pp. 108, 118, 543). Prior to such lease to respondents this mine had been shut down for a period of ten or twelve years (R. pp. 34, 127).

Under each of the contracts the compensation paid by respondents to the contractor for the latter's work and service is at the rate of a stated but adjustable sum per ton of coal mined. Such sum reflects all of the cost of mining the coal plus a reasonable compensation to the contractor for his services and is adjustable with respect to cost factors beyond the control of the contractor. By each contract respondents are bound to adjust the stipulated per ton compensation rate to conform to fluctuations in wages, taxes and the cost of materials and in each case such compensation has been increased from time to time to meet increases in these costs (R. pp. 188, 195, 262, 269, 270, 272, 283, 300, 310, 538, 540).

The original rate of compensation per ton at the William-Ann mine was $1.355. The present rate per ton being paid to the contractor under this agreement is $1.637 per ton. The original rate of compensation per ton at the Glamorgan mine was $1.55, but this has, pursuant to the contract, been increased to $1.705. The original rate of compensation per ton at the Chilton Block No. 1 mine was $1.15, and is now $1.63 per ton. These sums are paid exclusively by way of compensation for the work and service of mining the coal and do not include the royalty paid to the landowners.

The lease to respondents of the William-Ann mine coal-bearing lands and the contract with D. H. Pritchard, the contractor, for the service of mining the coal at that mine were originally made in May, 1934. The proposed arrangement was previously submitted by respondents to the National Industrial Recovery Act authorities and approved by such authorities as not

constituting an evasion nor contravening the price-fixing and other regulatory provisions of the applicable Code of Fair Competition set up under that Act* (R. pp. 35, 466, 487.) conference and correspondence with Donald Richberg). The agreements covering operation of the Glamorgan mine were made in July, 1934, and for the Chilton Block No. 1 mine in July, 1935.

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* This Code set up a price-fixing and regulatory system which was substantially similar to and constituted the precedent and working model for subsequent stabilizing legislation, including the Act here involved. Vol. I, Codes of Fair Competition, p. 323 (published by NRA).

SUMMARY OF THE ARGUMENT.

I.

It not material whether respondents fall within the specific meaning of the exemption provision of Section 4-II(l), for the reason that the price-fixing and regulatory provisions of Section 4 as a whole do not in any event apply to the mining operations here involved. These operations are not within the scope of the Bituminous Coal Act at all, because the specific purpose of the Act was the amelioration of the depressed condition of the commercial coal industry and, with that end in view, its entire regulatory scheme is directed solely toward prices and competitive methods with respect to the sale or other transfer of title to coal as personal property constituting an article of commerce.

Since the operation of respondents' mines is carried out without any sale or transfer of title as between the respondents and their contractors, the Act has no field of operation. Respondents own the coal or the exclusive right to mine it by virtue of leases obtained from landowners who are entirely independent of and have no connection with either respondents or their contractors. Respondents have engaged the services of contractors to mine the coal, all of which is consumed in the operation of the railroad of which respondents are Receivers. The coal is mined only in such amounts and at such times as the respondents direct, and the contractors never at any time have any interest in or title to the coal nor any power to dispose of it. The transactions between respondents and their contractors therefore do not constitute com-

merce or trade but are simply service arrangements, and the contractors are the agency through which respondents operate their mines.

The coal here produced is captive coal as that phrase is generally understood, and such coal was omitted from the field of the Act with full Congressional knowledge and intent. The price-fixing provisions of the Act were not intended to apply and cannot be applied because there are here no sales and no prices.

Application in this case of the regulatory and price-fixing provisions, on the theory that the contractors are producers, would nullify the tax provisions, which are explicitly made to apply only to producers who either consume their coal or sell it, and here the contractors can do neither.

The Circuit Court of Appeals properly held that the Act has no application in this case, and its judgment should be affirmed on this ground alone.

II.

Since the Act specifically provides for court review of orders made by the Director, with specific authority in the court to affirm, reverse or modify any such order, it cannot be successfully contended that his determination is final. It is true that his findings as to the facts are made conclusive on review, but the determination here made by the Director, that respondents are not producers of the coal within the meaning of the exemption provided by Section

4-II(1), is not in any sense a finding of fact. It is a conclusion of law, or at least a mixed conclusion of law and fact, whereas the Act plainly limits the finality of the Director's findings to the domain of the facts.

The argument of petitioners that the court must defer to the judgment of the Director not only as to findings of facts but with respect to his interpretation and construction of the Act is in plain contravention of the language of the Act itself and goes far beyond anything ever held by this Court. It is in effect a request for judicial abdication, and even goes to the extreme of asserting that the decision of the Director need not be based on evidence in the record, because his assumed special knowledge of the intent of Congress is sufficient to set his judgment beyond review—undisputed facts to the contrary notwithstanding.

The Director based his decision upon his conception of the "contemplation and design of the Act," and it is therefore reviewable as a legal conclusion.

III.

Respondents are the producers of the coal within the meaning of the exemption under Section 4-II(1) of coal which is consumed by the producer. As the Circuit Court of Appeals held, there is no logical difference so far as the intent of this section is concerned between a consumer who owns the coal in place and mines it by employees or servants, and one who mines it as respondents do by contractors who in some respects

are not servants or agents within the meaning of the law of torts. Whether the contractors are called "independent contractors," "agents," or "employees" is totally irrelevant to the issue, since they have absolutely no independent control over the production of the coal. The relationship between respondents and their contractors is clearly an *ad hoc* agency with respect to the production of the coal, and as between the landowners and respondents, and as between the Government, the public and respondents, the latter are the controlling and responsible parties with respect to the mining, shipment and disposal of the coal. Thus, respondents, not the contractors, must account to the landowners, and respondents would be accountable to the Government for production taxes or for any violation of law relating to the disposition of the coal, such as the commodities clause of the Interstate Commerce Act, Sec. 1(8).

Sec. 17(c), which states that as used in the Act the term "producer" includes all individuals, firms, associations, corporations, trustees and receivers engaged in the business of mining coal, does not support the decision of the Director. The section is merely precautionary as to the forms of organization under which coal may be produced, and obviously could not have intended to mean that all persons who are engaged in the mining operations are "producers," even if they have no title to or interest in the coal and cannot mine it except under the control and direction of the owner. The term "includes" cannot be construed to intend the exclusion from the category of producers of the real party in interest, the owning and controlling party in the production of the coal. "Producer" is generally

understood to mean, and was used by Congress to describe, the person who owns the coal, causes it to be mined, and controls its disposition—whether by sale or consumption.

The phrase "engaged in the business of mining coal" as used in Section 4-II(1) is not used in a technical jurisdictional sense but with reference to the whole economic activity or enterprise of coal mining, including the sale or disposal of the product. Since respondents absolutely control the mining of the coal and pay all the costs, they are engaged in the business and they are producers within the intention of this section.

To hold that the contractors, and not the respondents, are producers of this coal, would remove both parties from the application of the tax provisions of Section 3, a result which the Court will avoid in the absence of unambiguous and compelling language. The taxes levied by both Section 3(a) and Section 3(b) of the Act are payable only by producers who either consume or sell the coal which they produce, and a construction of the Act whereby its regulatory provisions are made to apply to one who cannot either sell or consume the coal would be self-contradictory and self-defeating.

The arrangements whereby respondents produce their railroad coal are not in any sense contrary to the intent and purposes of the Act. The particular methods and contractual arrangements whereby the owner of the coal has it extracted from the mine are not the objects of Congressional solicitude or regulation. The conditions sought to be remedied by the Bituminous Coal Act were not caused or contributed

to by, and did not arise out of, the mechanical details of the operation of coal mines but were the result of unrestricted and unregulated competition in the production of coal for and its sale in the commercial market. These conditions were caused by the uncontrolled and uncoordinated operation of the various elements of the laws of supply and demand. Here supply and demand are merged in one ownership and control and no competition or failure of coordination can exist. These operations are therefore entirely outside the social and economic horizon of the legislation.

IV.

If construed to apply to the operating arrangements at respondents' mines, the Act is beyond the power of Congress under the Commerce Clause, and if within the general delegation of that clause, is a violation of the Fifth Amendment as applied to respondents. The activities of the contractors here are limited to the extraction of coal from the mines, an essentially local matter. The attempted interference with such activities by a scheme of regulation directed toward the prices and practices involved in interstate commercial transactions is not a means logically or factually related or appropriate to the end sought. Congress has not found or declared the existence of any connection between arrangements such as these or any other form of captive production and the evils to be remedied, and none can reasonably be found. Since the type of regulation asserted by petitioners as intended by the Act bears no reasonable relation to the exercise of the power of Congress over interstate commerce, it is invalid.

For like reasons the application of the Act here would deprive respondents of their property without due process of law. Enforcement of the price-fixing provisions of the law so as to require additional payments by respondents to the landowners from whom they acquired the coal or to the contractors would arbitrarily deprive respondents of their property and unjustly enrich the others.

Petitioners assert that respondents are required by the Act to pay the applicable commercial coal prices by apportioning the total amount of that price between the landowners and the contractors, although the Act prescribes no such apportionment and no standards for the guidance of administrative authorities in regulating or approving such split payments are laid down either by statute or by any administrative orders or rules. No logical basis for such an apportionment has been or could be suggested.

Commercial prices are fixed under the Act with relation to average production, administrative and selling costs over wide areas, and reflect items of cost which are not present in these operations and which are totally unrelated to the value of the mining rights or of the services rendered by the contractors. To require respondents to pay over large sums so calculated out of the receivership estate would not further any legitimate aim of Congress and would in fact not support or effect the declared purpose of the Bituminous Coal Act, and such a requirement would therefore contravene the Fifth Amendment.

ARGUMENT.

I.

Section 4-II of the Act applies only where there is a sale of or other transfer of the title to the coal by the producer and to transactions or commerce in such coal. The Act accordingly has no application to the coal involved in this case.

Throughout the Bituminous Coal Act of 1937 there is unmistakable language evidencing the intent of Congress to regulate only those transactions and commerce in coal which involve a sale or other transfer of title to such coal by the producer between its removal from the ground and its consumption. The preamble (or Section 1) of the Act is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

The use of such expressions as "sale and distribution," "practices and methods of distribution and marketing," "regulation of the prices thereof" and

"of unfair methods of competition therein" state the whole philosophy of Section 4 of the Act, which clearly concerns itself solely with commercial transactions or, stated otherwise, those transactions in which there is a transfer by the producer of title to his coal.

Other sections of the Act give abundant support to this conclusion.

In Section 2(b) of the Act provision is made for the appointment of a Consumers' Counsel, whose duties are relevant to those transactions only which involve commercial and market practices which affect the general consumer.

The following language emphasizes the Act's preoccupation with commercial transactions:

"Marketing" the title of Part II; provision in subdivision (a) of this Part II for the report by Code members of "spot orders," for the filing by Code members of copies of all contracts "for the sale of coal," for proposals required to be made by the respective District Boards of "minimum prices free on board transportation facilities at the mines * * * so as to yield a return per net ton for each District in a minimum price area"; provision that the minimum "prices" so proposed shall reflect, as nearly as possible, the relative "market value" of the various kinds, etc., of coal * * * and shall have due regard to the interest of the "consuming public"; provision that the weighted average of the total cost determined by the Commission and transmitted to the District Boards shall be taken as the basis for the proposal and establishment of minimum "prices" for coal.

Likewise, the provisions in Section 4(e) that no coal subject to the provisions of Section 4 shall be "sold or delivered or offered for sale" at a *price* below the minimum or above the maximum therefor established by the Commission, and the "sale or delivery or offer for sale of coal" at a price below such minimum or above such maximum shall constitute a violation of the Code; that the making of a "contract for the sale of coal at a price" below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the Code; that from and after the date of approval of the Act until "prices" shall have been established pursuant to sub-sections (a) and (b) of Part II of Section 4, no contract "for the sale of coal" shall be made providing for delivery for a period longer than thirty days from the date of the contract, and that no contract shall be made "for the sale of coal" for delivery after the expiration date of the Act at a price below the minimum or above the maximum therefor established by the Commission and in effect at the time of making the contract.

Every phrase points clearly and unmistakably to the intent of Congress to limit and restrict the application of the provisions of Section 4 of the Act to commercial transactions in coal *which is sold or the title thereto otherwise transferred by the producer of the coal.*

The enumerated practices with respect to coal, and which Section 4(i) of the Act provides shall constitute violations of the Code, all, either in express terms or by clear implication, relate and apply only to practices in or incident to *sales of or other transfers of*

title to the coal by the producer, and are also indicative of the intent of Congress to so limit and restrict the application of Section 4 of the Act.

That Section 4 of the Act applies only to coal which is sold or the title thereto otherwise transferred by the producer is clearly recognized and confirmed in the provisions of Section 4-A of the Act, which is supplementary to Section 4. Section 4-A expressly provides in effect that when the Commission shall have found the transactions in coal in intrastate commerce directly affect interstate commerce, "thereafter coal *sold*, delivered or offered *for sale* in such intrastate commerce shall be subject to the provisions of Section 4."

Transactions here considered involve personal services and not trade in coal as an article of commerce.

Sections 4 and 4-A of the Act relate and apply only to transactions *in coal* as an article of commerce. The transactions here involved between the respondents and the contractor whereunder the contractor performs the work and service of digging the coal and is paid therefor by the Receivers are not transactions or *commerce in coal* but are contractual arrangements *for work and service* and clearly involve only local activities. The fact that the work and service consists of the extraction and loading of coal which is owned, shipped by and to and consumed by respondents and in which the contractor has no title or interest, cannot transmute such contractual arrangements into a *transaction in coal* or into *commerce in coal*.

Captive coal is not a factor in the problem sought to be ameliorated by the Bituminous Coal Act.

The Congress was not at all concerned with the production of what is universally known as captive coal and did not attempt to regulate in any way the cost or method of production of such coal.

Petitioners object (Brief, pp. 47, 48) to the use by the Circuit Court of Appeals of the common phrase, "captive coal," saying that it is a "loose" term, not used in the Act. The term may be loose in that it applies to the coal produced by or under the control of large industrial consumers for their own use, in a number of different ways. It is well known in the trade, however, and simply means coal which does not reach nor directly affect the general market. Thus statistics of production in the industry are compiled under the two headings, "captive tonnage" and "commercial tonnage."

It was not necessary to use it in the Act since the legislation is only directed toward commercial production, and, as Mr. Hosford said, "Inasmuch as captive coal does not affect the commercial market, it has been disregarded."*

Petitioners correctly assume that Mr. Hosford's statement (R. p. 579) that "the price provisions do not apply to captive coal at all" is based upon the obvious fact that price provisions are incapable of being applied to such coal (Brief, p. 48). That is

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* Testimony of Mr. Chas. F. Hosford, Jr., Chairman of Coal Commission established under National Coal Conservation Act of 1935 and first Chairman of Bituminous Coal Commission established under Bituminous Coal Act of 1937, quoted by the court below (R. pp. 578, 579).

precisely the situation presented here, and it is the reason why Congress did not in the Act attempt it.

This Court, in sustaining the validity of the Act in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, explicitly recognizes the limitation of the scope and objectives of the Act to commercial transactions. The regulatory provisions are held to be within the power of Congress, because "these provisions are applicable only to sales or transactions within or directly or intimately affecting interstate commerce. The fixing of prices, proscription of unfair trade practices, establishment of marketing rules respecting such sales of bituminous coal constitute regulations within the competence of Congress under the commerce clause." 310 U. S. 393.

> "It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry." (Ib., p. 395).

Thus, this Court recognizes what is made plain in the preamble and body of the Act, and in fact is a matter of common knowledge, namely, that the competition for the general market resulting in price cutting and various unfair methods of competition was the evil sought to be remedied. The production of coal at these railroad mines is not a part of the competive picture. There are no unfair methods of competition in the mining of the coal, because there is no competition, and there are no prices, because there

are no sales. The only tangible bases for the Act are not present in this case.

Whatever, academically considered, may be the power of Congress over the production and interstate transportation or other transactions in coal, the regulation undertaken by that body in the Bituminous Coal Act of 1937 plainly contemplates a sale or other transfer of title *by the producer* before the coal comes within the scope and purview of Section 4-II of that Act. The Director's conclusion completely ignores the fact, as held by the court below in this case and as recognized by this court in *Sunshine Anthracite Coal Company* v. *Adkins*, supra, that the price regulations of the Act relate or apply only to coal or transactions in coal in which a sale or other transfer of title to the coal *by the producer* occurs. Upon this point the decision by the court below states:

> "The mistake of the Director was due to considering the various incidents of the process of the production and ignoring the vital element of price regulation. There is manifestly nothing upon which price regulation can operate where no price is possible; and no price is possible where *no sale can possibly take place* and all that is involved is the mining of coal under contract for the owner." (R. p. 577). (Emphasis ours.)

If, as respondents contend and as held by the court below, Section 4-II of the Act applies only to coal which is sold or the title thereto otherwise transferred *by the producer*, then in determining the right of respondents to the exemption claimed the question of whether the coal is produced by respondents or by the contractors becomes wholly immaterial, for obviously

no sale or transfer of title by respondents to themselves of their own property can occur and the clear and uncontradicted evidence as shown by the record is that no sale or transfer of title to the coal by the contractor takes place. (See pp. 56-59, *infra.*)

The judgment of the Circuit Court of Appeals should be affirmed, therefore, on this ground alone. Petitioners assert that "even had Congress intended the Act to apply only to sales, that fact alone would scarcely make respondents the producer of the coal which they consume and consequently would not bring them within the exemption contained in Section 4-II(l)" (Brief, p. 44). This appears to carry the implication that petitioners would attempt to regulate respondents' business even if convinced that Congress had no such intention, but however that may be, the proposition misconceives the scope and intent of Section 4-a, which does not limit exemptions to those specificaliy allowed under the terms of Section 4-II(l). The language of Section 4-A is that "Any producer believing that *any* commerce in coal is not subject to the provisions of Section 4" may apply for exemption. If applications were to be limited to coal entitled to exemption only under the terms of Section 4-II(l), Congress could easily have said so.

In *Northwestern Imp. Co.* v. *Ickes*, (CCA 8th), 111 Fed. (2d) 221, the Court sustained the denial of an exemption sought under Section 4-A on the ground that the transactions involved were local matters not subject to regulation under the commerce clause. The construction of Section 4-II(l) was not involved, as exemption was not claimed on the ground that the railroad was the producer, but no question was raised as to the propriety of the application.

The tax provisions of the Act compel the conclusion that the regulatory provisions have no application where no sale or transfer of title takes place.

It is argued for petitioners that the absence of a formal sale or transfer of title is immaterial (Brief, pp. 43-46). In support of this it is pointed out that the Act makes frequent use of other phrases or terms, such as "sale or other disposal" "delivery," and "transtions." That they all mean transfer of title to coal as an article of commerce from the producer to the consumer is made abundantly clear by Section 3. Section 3(a) provides that:

> "There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof an excise tax of 1 cent per ton of 2,000 pounds.
>
> "The term 'disposal' as used in this section includes consumption or use (whether in the production of coke or fuel or otherwise) by a producer and any transfer of title by the producer other than by sale."

If respondents are not the producers, as petitioners say they are not then this tax is owed by nobody, for it becomes due only when coal is sold, consumed, or its title otherwise transferred by the producer. Since respondents consume it, if they are not its producers it can only be taxed if the person who is the producer sells or otherwise transfers title to it, which the contractor here is unable to do because he never has any right, title or interest in the coal to sell or transfer.

Section 3(b) levies a tax, in identically the same

terms as Section 3(a), in the amount of 19½ percent of the sale price or market value of the coal, upon all coal which is subject to the price-fixing and regulatory provisions of Section 4 of the Act, unless the producer against whom the tax is levied is a member of the Code.

This tax is, of course, a penalty, and constitutes the sole sanction behind the regulatory provisions of Section 4. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 389, 392.

Here again the tax would fall, under petitioners' contention, and we would have the anomalous situation of an attempted application of the regulatory provisions the violation of which would result in no applicable penalty. As this Court said in the *Sunshine* case (p. 392):

> "The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question."

It is therefore clear that the regulatory provisions embodied in Section 4 of the Act can have and are not intended to have any application in the situation presented by this record, and that an affirmance of the judgment below does not depend upon the decision of the questions hereafter discussed.

The general intent and scope of the Act outlined above requires the conclusion that respondents are necessarily the producers of the coal within the meaning of Section 4-II(1). Before discussing that question in further detail, however, we will take up petitioners' contention that the Directors' determination on the point is conclusive.

II.

The Director's conclusion as to the scope of the Act has no finality either under the terms of the statute or the decisions of this Court.

Petitioners' argument that the Director's "determination" is conclusive, if supported by substantial evidence, is directed to the conclusion reached by the Director that respondents are not producers within the meaning of Section 4-II(1). As we have pointed out, the decision of this question one way or another is not necessarily determinative of the case. The Director's conclusion on this point was demonstrably wrong, however, and we think it clear that his conclusion was properly and correctly reviewed by the court below.

The general provision of the Act with respect to review is contained in Section 6(b), the pertinent language of which is:

> "(b) Any person aggrieved by an order issued by the Commission (Director) * * * may obtain a review of such order in the Circuit Court of Appeals * * *. The Court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part * * *. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

In addition to this general provision, Section 4-A, which deals with applications for exemption, concludes with the mandate that:

> "Any applicant aggrieved by an order denying or otherwise disposing of an applica-

> tion for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of Section 6."

Counsel for petitioners refer at the beginning of the argument (Brief, p. 15) to a "statutory mandate that the Director's *decision* is binding if supported by substantial evidence." The statute contains no such mandate. Not the Director's *decision*, but only his "findings as to the facts" are made conclusive. His decision is presumably based on his findings of facts (although petitioners argue that even this should not be required (Brief, p. 23; infra, p. 00), but the decision, as distinguished from the findings of fact upon which it is based, is given neither *prima facie* nor final conclusiveness by the statute.

Petitioners, confronted by a statutory provision authorizing review of orders of the Director, the scope of review being limited only to the extent that the "finding * * * *as to the facts*" shall be conclusive if supported by substantial evidence, proceed to argue that this limitation upon the scope of review is not sufficient, that Congress should have gone further, and that the Court should read into the Act something that is not there, namely, an intention on the part of Congress to turn over to a bureau the whole field of interpretation and application of the law. The basis of the argument (p. 12) is that the "administrative tribunal is more, rather than less, expert than the judge, *not only in the solution of factual problems*, arising in its specialized field, but also in its familiarity with the background and purpose of the statute and with the practical consequences which will ensue from any particular construction." The Courts, as we understand

their function, are charged with ascertainment of the scope and meaning of the law. If the terms of a statute compel a particular construction, its practical consequences are for the consideration of the law-making body and not for the interpreter. The doctrine advocated is an invitation to unrestrained administrative legislation.

This goes far beyond anything held in *Shields* v. *Utah Idaho Central Ry.*, 305 U.S. 177; *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, or *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, cited by petitioners, each of which expressly recognized that to the courts belong the determination whether the Commission's order "departed from the applicable rules of law," and whether "its finding had a basis in substantial evidence or was arbitrary and capricious."

If the doctrine advocated by the Government were recognized, there would be no field left for the review provided for in Sec. 6(b), which expressly states that the Court shall have authority to "affirm, modify and enforce, or set aside, such order in whole or in part." If the Board can interpret the Act, and its interpretation is conclusive, there is nothing left for the reviewing Court to decide.

In the *Shields* case, the Interstate Commerce Commission was "authorized *and directed* upon the request of the Mediation Board or upon the complaint of any party interested *to determine* after a hearing whether any line operated by electric power" is within the exception of interurban electric railways.

The Court points out that Congress *did not define the term "interurban."* Since Congress could decide

that any interstate carrier was subject to the Railway Labor Act, whether interurban or not, it was free to leave to the Commission the decision of questions of fact as to whether the railway came within the broad exception. Congress having admitted power to include interstate carriers, "no constitutional question is presented calling for the application of our decisions with respect to a trial *de novo* so far as the character of the respondent is concerned."

In the instant case the Act, viewed as a whole, does contain a definition or limitation as to its scope, and it contains no such express direction that the administrative tribunal shall exercise its discretion as to what matters are within that scope.

The field of operation of the statute is by plain definition as well as by implicit construction limited to the commercial sale of coal in the national marketplace, and it necessarily follows that the Director is without authority to widen the field to include activities outside the ambit of Congressional action.

There are two additional and compelling reasons why the result reached in the *Shields* case cannot apply here.

The first is that here we have a constitutional question the determination of which depends upon the conclusion as to the scope of the Act as applied to respondents, and under settled principles the reviewing court must decide that question for itself.

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287;
Bluefield Waterworks & Imp. Co. v. *Public Service Commission*, 262 U. S. 679, 689;

Phillips v. *Commissioner*, 283 U. S. 589, 600;
Crowell v. *Benson*, 285 U. S. 22, 54-61;
St. Joseph Stockyards Co. v. *U. S.*, 298 U. S. 38, 51-52.

The second is that in the *Shields* case Congress definitely directed the Commission to determine the question of the scope of the Act within the general framework established, whereas here there has been no such specific delegation. On the contrary, the Congress not only made general provision in Section 6(b) of the Act for review by the courts of administrative orders, but in order to make doubly certain the right of persons situated as are respondents to judicial determination of any contested application of the substantive provisions of the Act to them, it added to the section covering applications for exemption this unambiguous mandate:

> "Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided for in subsection (b) of Section 6." Sec. 4-A; 15 U. S. C. A., Secs. 834, 836.

The argument of the Government (pp. 20-22) that decision by the Director of mixed questions of law and fact should be conclusive, even where, as here, the determination involves a conclusion as to the substantive scope of the statute, besides running counter to the express language of the Act, has been repeatedly rejected by this Court, in decisions involving the review of the judgments of State courts, where the scope of

review is by judicially established rule the same as that laid down in the Coal Act, namely, that this Court will accept the facts as found,

> "This Court may, of course, upon writ of error to a State court examine the entire record, including the evidence, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon questions of Federal law as to be really a decision of the latter."
>
> —Brandeis, J., dissenting, *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 298, citing *Kansas City Southern Co.* v. *Albers Commission Co.*, 223 U. S. 573, *Cedar Rapids Gaslight Co.* v. *Cedar Rapids*, 233 U. S. 655; *Graham* v. *Gill*, 223 U. S. 643.

The same qualification applies to the rule of finality of administrative findings with respect to statutory review of Federal tribunals. *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38, 74.

The familiar limitation on the scope of review, and the one obviously contemplated by Sec. 6(b) of the Coal Act, is simply that the Court will not undertake to pass upon the relative weight of conflicting evidence. *Oregon Ry. & Nav. Co.* v. *Fairchild*, 224 U. S. 510, 528.

The same traditional limitation of the scope of review applies in the review of decisions of the Board of Tax Appeals under the Revenue Acts, *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 600, and in the review of actions by other administrative tribunals, such as the Federal Trade Commission, 15

U. S. C., Sec. 45*; the Federal Power Commission, 16 U. S. C., Sec. 813; the Secretary of Agriculture—cf. *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38.

In none of its decisions with respect to these tribunals has this Court, so far as we are aware, abdicated its judicial function to determine the proper scope and applicability of the substantive law, as petitioners would have it do here.

The distinction between determinations of evidentiary or circumstantial facts which the Courts are bound to accept, and ultimate conclusions, whether of fact or law or mixed, which will be reviewed is clearly exemplified by the tax cases. The pertinent sections of the Revenue Acts, now embodied in Section 1141 of the Internal Revenue Code, have for years provided that the Circuit Court of Appeals shall have "exclusive jurisdiction to review" the decisions of the Board of Tax Appeals, with the "power to affirm or, if the decision of the Board is not in accordance with law, to modify or reverse the decision."

The scope of review under this law is well illustrated by the case of *Helvering* v. *Tex-Penn Oil Company*, 300 U. S. 481, in which this Court affirmed a decision of the Third Circuit Court of Appeals which had reversed a decision of the Board of Tax Appeals (28 B. T. A. 917) determining deficiencies in large amounts against the Oil Company for the year 1919. The basic facts were that the Tex-Penn Oil Company in that year transferred all its assets to the Transcontinental Oil Company in exchange for certain

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* *Goodyear Tire & Rubber Co.* v. *Fed. Trade Comm.*, 101 F. (2d) 620, 624, cert. den. 308 U. S. 557; *Fed. Trade Comm.* v. *Paladam Co.*, 283 U. S. 643.

shares of stock. The Internal Revenue Department asserted that the consideration for the transfer included not only the stock but also $350,000 in cash. The Board made elaborate findings of what it called "circumstantial facts" upon the basis of which it concluded in what it termed an "ultimate finding" that the consideration for the transfer included cash and hence the transaction was not one in which assets were transferred for stock alone. The Board accordingly held that the transaction did not come within a provision of the Revenue Act providing, in substance, that no gain or loss shall be deemed to occur in cases in which corporate assets are transferred solely for stock.

In reviewing the Circuit Court of Appeals' decision, this Court said:

> "The foregoing includes the substance of all the findings of circumstantial facts material to the question under consideration. They must be taken as established if supported by substantial evidence. *Helvering* v. *Rankin*, 295 U. S. 123, 131; *Old Mission Co.* v. *Helvering*, 293 U. S. 289, 294; *Burnet* v. *Leininger*, 285 U. S. 136, 138, 139; *Phillips* v. *Commissioner*, 283 U. S. 589, 600; *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716. There is no suggestion that they are not amply sustained. In addition to and presumably upon the basis of these findings, the Board made its 'ultimate finding.' And upon that determination it ruled that the transaction was not within the nonrecognition provisions of Section 202(b). The ultimate finding is a conclusion of law at least a determination of a question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts.

> It is subject to judicial review and, on such review, the Court may substitute its judgment for that of the Board. *Helvering* v. *Rankin*, *ubi supra*." 300 U. S. 481, 490, 491.

The Court then pointed out that the circumstantial facts found by the Board did not support at least two of the Board's ultimate findings, and affirmed the action of the Circuit Court of Appeals in reversing the Board.

There are, of course, matters primarily within the executive domain, such as alien deportation and use of the mails*, which have been left to conclusive determination by designated officers or tribunals, and "with respect to them, the function of the Courts is not one of review but essentially of control—the function of keeping them within their statutory authority." Brandeis, J., dissenting in *Crowell* v. *Benson*, 285 U. S. 22, 89, 90.

Shields v. *Utah Idaho Central Ry.* and the *Bassett* and *Rochester Telephone Co.* cases, insofar as they extend the rule of administrative finality beyond that established in the tax, trade commission, and other cases above cited, clearly fall within this limited and special class of cases.

Even in such cases, however, it is held "that Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer"—ibid., p. 91.

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* Cf. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, cited in brief for petitioner at p. 24, and *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 104.

Here it is impossible to assert that the function of the Court is limited to a generalized control over the operation of the administrative body for the purpose of keeping it within bounds*, since the statute in two places charges the Court with the obligation to *review* the tribunal's decisions.

Congress has made specific provision for review in the Bituminous Coal Act, and there is accordingly no room for the speculations indulged in by counsel for petitioners (Brief, pp. 20-26) as to what Congress might be "supposed" or "assumed" to have intended with respect to the hypothetical desirability of freeing an assumed expert in all things both factual and legal from judicial supervision. The result of the doctrine here urged upon the Court would be "to establish a government of a bureaucratic character alien to our system," *Crowell* v. *Benson*, 285, U. S. 22, 57. Fortunately, Congress has foreclosed the possibility in this case.

The argument of the Government here goes to the astonishing extreme of asserting that the decision of the administrative body, the sanctity of which is expressly confined to its "findings as to the facts," should be accepted by the Courts "*irrespective of whether based on facts in evidence* or on familiarity with the legislative and practical setting of the particular statutory provision involved" (Brief, pp. 22, 23). Any such totalitarian conception of the obligations of fair play as between Government and citizen would be

* Even if jurisdiction in this case were so limited, the Court would have to decide whether the Director had exceeded the statutory authority by bringing within its scope matters left outside the scheme of the statute, and whether the determination was rationally supported by the evidence.

shocking even in the absence of the many decisions of this and other courts condemning judgments based upon considerations unknown to the person affected—cf:

> *I. C. C.* v. *L. & N. Ry.*, 227 U. S. 88, 93;
> *Chicago Junction* case, 264 U. S. 258, 263;
> *U. S.* v. *Abilene Southern Ry.*, 265 U. S. 275, 288;
> *Crowell* v. *Benson*, 285 U. S. 22, 48.

Thus the doctrine of bureaucratic infallibility is sought to be extended from the field of evidentiary fact-finding to which it is, in this Act at least, specifically confined by Congress itself, to the entire legal and judicial territory of the law involved. Each Act of Congress would thus be surrounded by and isolated within its own little priesthood, whose sacred pronouncements would be beyond the reach of profane criticism by the courts of the country.

Although the Director's determination that respondents are not producers was stated both as a finding of fact (No. 13, R. p. 547) and as a conclusion (R. p. 549), it is obvious that the determination is not in any sense a finding of an evidentiary or circumstantial fact. Indeed, the Director himself recognized this in his statement that "In view of these many important facts *I am of the opinion* that Applicants are not a producer of coal *within the contemplation and design of the Act.*" (R. p. 549). The determination is thus plainly based upon the Director's interpretation or conception of the scope of the Act as applied to the facts disclosed by the record, a determination clearly within the judicial province.

III.

Respondents are producers of the coal which they consume within the meaning of the exemption contained in Section 4-II(l), and the Director's decision to the contrary is without any rational basis in the record.

The court below correctly held that respondents are both the producers and consumers of the coal within the meaning of the exemption provisions of Section 4-II(l) of the Act. The part of its opinion on this point begins on page 579 of the Record. In substance, the Court said that it obviously makes no difference, so far as the objectives of the Act are concerned, whether the owner of coal in place, or of the exclusive right to mine it, has the coal extracted by servants or by contractors; that if the railroad were to sell this coal on the market, which it has a perfect right to do, it would clearly be subject to the Code and price-fixing provisions, since that would be the first sale after production; that the railroad does in fact pay the cost of mining the coal; and that the contractor is not of the class sought to be protected by the Act since he has no right or power either to mine or sell the coal.

The Circuit Court of Appeals cited (R. p. 580) in this connection the case of *Consolidated Indiana Coal Co.* v. *National Bituminous Coal Commission*, 103 F. (2d) 124, which held that coal mined for the Rock Island Railroad by a corporate subsidiary was exempt under Section 4-II(l), for the reason that the subsidiary acted merely as the agency by which the railroad consumer produced the coal.

The respondents, like the trustees of the Rock Island, can produce coal for the use of the railroad only by agents. The fact that the agency through which the coal acquired by the respondents from the landowners is produced for their use is an independent contractor rather than a controlled subsidiary does not and can not affect the principle that where the railroad is the consumer of the coal it is none the less the producer where it utilizes some outside agency to do the mining.

The present case is a stronger one for the exemption than was that of the Consolidated Indiana Coal Company because here the contractor has no interest whatever in the coal which is mined, since it belongs to respondents *ab initio*, whereas in that case title to the coal was in the Coal Company and passed to the Railway only upon delivery.

Section 17(c) does not require or justify denial of the exemption.

The conclusion of the Director that the Receivers are not producers of the coal is based upon the erroneous assumption, rejected by the court below, that the question of whether one is a producer depends in turn upon whether he is engaged directly and physically "in the business of mining" the coal. This assumption is based upon the language of Section 17(c) of the Act, which states that as used in the Act "the term 'producer' includes all individuals, firms, associations, corporations, trustees and receivers engaged in the business of mining coal." As held by the court below (R. p. 579), the language of Section 17(c) plainly does not justify the restrictive application of it adopted by

the Director, who assumes that the section constitutes an all-inclusive definition of the term "producer" as used in Section 4-II(l). The word "producer" is used throughout the Act and in many different contexts, and it is clear that Section 17(c) was intended not as an all-embracing definition of what circumstances would constitute a given operator a producer but to make plain that a producer engaged in the business of mining coal would be included in and subject to the various applicable provisions of the Act. The purpose of the section was to extend the coverage of the term "producer," not to limit it.

The use of the term "includes" obviously excludes a construction that the definition of "producer" in this section is all-embracing.

The word "producer," as used in Section 4-II(l) of the Act, is of broader signification and is employed therein having reference to all of the provisions of the Act. The Act applies to the two following classes of coal:

> (i) Coal owned in place and after its extraction consumed by the same owner thereof;
>
> (ii) Coal owned in place by one owner and disposed of after extraction by sale or otherwise to another and different owner.

Coal of both classes is dealt with in Section 3—the tax section of the Act. It seems plain that coal exempted by virtue of Section 4-II(l) of the Act includes coal of the first above-stated class which is produced either by the owner thereof personally or through agencies or instrumentalities employed by such owner.

Coal produced personally by the owner in place or through such agencies or instrumentalities is subject to the tax levied by Section 3(a), as we have pointed out (*supra*, p. 26), and the railroad has regularly paid the tax as producer of this coal.

If the position of the Director that the definition of the term "producer" in Section 17(c) of the Act excludes respondents here is correct, then, as we have demonstrated, the coal produced at these three mines would be exempted from the provisions of Section 3 of the Act. The construction urged by respondents, that the definition of "producer" in Section 17(c) of the Act is *not* all-inclusive, and that Congress intended by Section 4-II(l) to exempt from Section 4-II coal which is consumed by the owner and produced for him by agencies or instrumentalities employed by such owner, avoids the anomalous situation which the construction contended for by petitioners would produce, and harmonizes, with the clear legislative intent that coal owned both before and after severance by the same owner and produced either by such owner himself or through agencies or instrumentlaities employed by him is within both Section 3—the tax provisions, and Section 4-II(l)—the exemption provisions, of the Act.

That Section 17(c) of the Act is inclusive rather than restrictive in its effect is apparent from other sub-sections of Section 17, which use the proper word "means" where complete definition is intended, and the word "includes" where partial definition is intended.

Section 17 provides:

> "SEC. 17. As used in this Act—
>
> (a) The term 'coal' means bituminous coal.
>
> (b) The term 'bituminous coal' includes all bituminous, semibituminous, and sub-bituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British Thermal Units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.
>
> (c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.
>
> (d) The term 'interstate commerce' means commerce among the several State and Territories, with foreign nations, and with the District of Columbia.
>
> (e) The term 'United States' when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia."

It would not be seriously contended that if the definition in Section 17(b) had read "bituminous coal includes semi-bituminous, subbituminous and lignite coal" other coal properly classifiable as bituminous coal would have been excluded and only the types of coal mentioned in that paragraph are subject to the Act. Yet petitioners seek to have this Court exclude a group of "producers" who are not mentioned in Section 17(c) but are included in Section 3 from the exemption provisions of Section 4-II(l) of the Act.

Language similar to that of Section 17(c) is used in Section 17(e), but, we ask, would the individual States be excluded if this paragraph had read:

> "(e) The term 'United States' when used in a geographical sense includes the Territories of Alaska and Hawaii, and the District of Columbia"?

Sections 17(a) and (d) clearly show what definitions Congress intended to make all-inclusive. In each of these subsections the word "means" makes it clear that the definition is all-embracing. The absence of that word in Section 17(e) just as forcefully demonstrates that the definition of the term "producer" in Section 17(c) is not all-embracing.

The contractors are the agencies whereby the railroad mines its coal. Whether the relationship is strictly one of principal and agent is immaterial in this case.

Petitioners argue at considerable length (Brief, pp. 37-43) that the contractors were not the agents of respondents because they were "independent contractors." We think it clear that the question whether the contractors are indepedent or not is irrelevant to our problem since even an independent contractor is an agent for the end for which he is employed, and respondents' contractors are the agencies through which respondents obtain the coal from their mines.*

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* *Consolidated Indiana Coal Co.* v. *National Bituminous Coal Commission*, supra; *Oliver Iron Mining Company* v. *Lord*, 262 U. S. 172; *Rothschild* v. *Northern Pacific Railroad Co.*, 68 Wash., 527; *Galveston Causeway Construction Co.* v. *Galveston H. & S. A. Ry. Co.*, 284 Fed. 137, affirmed 287 Fed. 1021 (CCA 5th), cert. den. 262 U. S. 747, *Agency Restatement*, Vol. 1, p. 9, et seq.; *Foss-Hughes Co.* v. *Lederer*, 287 Fed. 150.

That the exemption is intended to include coal produced through independent agencies or instrumentalities as well as that produced directly or personally must be assumed, for otherwise the operation of the exemption provision would be unfair and discriminatory in that it would grant the exemption only to coal produced personally by the owner and would deny it to an owner identically situated who chose to produce the coal through a different or independent agency.

The evidence is clear and uncontradicted that the coal here involved is being mined solely for the railroad's own use and under its orders. This being the case, the relationship between respondents and their contractors must of necessity be one of principal and agent. The subordination of the absolute dominion over the article involved is the factor that determines whether or not the one who has custody of the article is an agent, not the nature of the contract between him and the one who has such absolute dominion. So long as respondents' leases are in force they alone can mine or order mining done on the land under lease. The contractor is without power to extract legally one pound of coal from respondents' mines should they see fit to withhold their consent. Necessarily, therefore, as between respondents and the contractors there is an agency relationship *ad hoc*.

Great emphasis has been laid upon various sections of the contracts to demonstrate the lack of control of respondents over the activities of the contractors. It must be remembered, however, that the processes involved in the operation of a coal mine are highly complicated. The same control and direction

of activities by the principal that would be given over the activities of a section laborer or a porter would merely clog and hinder the efficiency of the contractor.

Moreover, in addition to absolute subordination of ownership, respondents do exercise control over the contractor. Paragraph 7(a) of the contracts (R. pp. 262, 300, 326 by reference) recognizes the right of the railroad to control salaries and rates of pay not within the purview of Exhibit "B" (R. p. 310). Likewise, paragraphs 9 and 10 of the contracts (R. pp. 265, 303, 326 by reference) reserve to the respondents control over the accounting, and over the amounts of coal to be mined.

No one would argue here that as between the railroad and the landowner, the contractors are not the agents of the former. Every pound of coal shot down from the faces must be accounted for by the railroad in royalties. Likewise, should any of the coal be sold on the market, as between the parties and the government the railroad would plainly be responsible for compliance with this and other laws, as the Circuit Court of Appeals said (R. p. 579).

In *Rothschild* v. *Northern Pacific R. Co.*, 68 Wash. 527, the railroad delivered a car of freight to a transfer company, which had been employed by the plaintiff (consignee) to remove the contents of the car to his warehouse. The employees of the transfer company opened the doors of the freight car and before any unloading was done the contents (alcohol in barrels) burst into flames and were destroyed. Plaintiff brought suit against the railroad company to recover the value of the destroyed merchandise. He asserted that the

transfer company was an independent contractor and that a delivery of the consignment to it did not bind him, as it was not his agent. The Court found for the railroad company and used the following language:

> "The Court found that the Holman Transfer Company, whom the plaintiff appointed to receive the property, was an independent contractor, and it is argued that, because of this fact, the relation of principal and agent did not obtain between the plaintiff and the transfer company, and hence notice to the transfer company of the broken condition of the barrel was not notice to the plaintiff. But we can not accept this doctrine. It may be that the transfer company was so far an independent contractor that its acts of negligence resulting injuriously to third persons, even though while in the immediate work of making the transfer of the property, would not give such third persons a right of action against the plaintiff, but as between the plaintiff and the defendant the transfer company was clearly the plaintiff's agent with reference to receiving the property from the defendant and consequently notice to it was notice to the plaintiff."

In *Galveston C. Construction Co.* v. *Galveston H. & S. A. Ry. Co.*, 284 Fed. 137 (D. C. S. D. Tex.), affirmed 287 Fed. 1021 (CCA 5), certiorari denied 264 U. S. 747, a contractor agreed to build a causeway for a group of railroads. The contractor's compensation was fixed at a definite sum. He failed to complete the work for the contract price and railroads finished it at a cost far in excess of the price agreed upon. Before the railroads could file suit to recover from the contractor and his surety the two latter filed a bill in

equity to have the contract set aside on the ground that it was inequitable. The bill was dismissed by the Court. It appears also that the complainants endeavored to show that the contract did not make the contractor an independent contractor and he being an agent, his principals could not recover for the additional cost of the work. In this case the District Court said:

> "I must advert briefly to the contention made so much of in complainants' brief that the contract did not make complainant an independent contractor, but merely an agent. Whether this is so or not it is unnecessary to decide, for there is no provision of law or of equity which prevents an agent from making an agreement to perform work upon a fixed compensation and upon a guaranteed cost."

The following statements contained in Restatement of the Law—Agency (Volume 1, p. 9, et seq.) are in conformity with these principles:

> " 'Principal' is a word used to describe a person who has authorized another to act on his account and subject to his control. It includes, therefore, both a person who has directed another to act on his account in business dealings or to represent him in hearings or proceedings, but who has no control or right of control over the other's physical conduct, and also a person who employs another to act in his affairs, having such control or right to control over his conduct that the other is termed servant, whether or not he renders merely manual services. The word 'master' as defined in Sec. 2 is not used in contrast with the word 'principal,' but as included within it. Thus, the owner of a business is a principal not only

in regard to brokers who, as to their physical acts, are independent of his supervision, but also in regard to salesmen who conduct business transactions under supervision as to their conduct and who therefore come within the definition of servant, and likewise in regard to janitors whose jobs are confined to the performance of manual acts on the premises, under the owner's supervision. The word 'principal,' therefore, includes both persons who are masters and persons who are principals but not masters.

" 'Agent' is a word used to describe a person authorized by another to act on his account and under his control. Included within its meaning are both those who, whether or not servants as described in Section 2, act in business dealings and those who, being servants, perform manual labor. *An agent may be one who*, to distinguish him from a servant in determining the liability of the principal, *is called an independent contractor. Thus, the attorney at law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions are agents, although, as to their physical activities, they are independent contractors.* Those are to be contrasted with others, such as clerks, train conductors, and other persons similarly employed, who are also agents although they fall within the category of servants. Likewise, the janitor of a building or the driver of a truck is an agent as that word is used in the Restatement of this Subject if he is employed under such conditions that he becomes a servant For many purposes it is immaterial whether or not one who is an agent is also a servant. However, the liability of a master for the torts of his servant is greater in extent than the liability of a principal for the torts of an agent who is not a servant

(see Secs. 219-255), and a master's duties to servants are different from those of a principal to agents who are not servants (see Secs. 472-528)." (Italics supplied.)

Section 2 of the Restatement defines the terms "master," "servant" and "independent contractor." The comment to that section discusses the distinction between servants and agents who are not servants, and says *inter alia:*

> "The word 'servant' is used in contrast to 'independent contractor,' a term which includes all persons who contract to do something for another and who are not servants with respect thereto. *An agent who is not a servant is therefore an independent contractor when he contracts to act on account of the principal* * * *. While an agent who contracts to act and is not a servant is therefore an independent contractor, not all independent contractors are agents. * * * The word 'servant' is thus used to distinguish a group of persons for whose physical conduct the master is responsible to third persons. It is convenient to distinguish this group of persons from all other persons for whose physical conduct the employer is not responsible. These persons fall into two groups; those who are agents but do not respond to the tests for servants, and those who are not agents. For the purpose of determining whether or not the employer is responsible for their physical conduct, however, it is immaterial whether such persons are agents or are not agents. For this reason the term 'independent contractor' is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible." (Italics supplied.)

Respondents are engaged in the business of mining coal within the meaning of Section 17(c).

Respondents may or may not be personally engaged in the business of mining coal, as that phrase is commonly used in the tax statutes and for purposes of obtaining jurisdiction, or otherwise, but they are certainly engaged in the business of producing coal through the agency of their contractors, and it is their responsibility. The fact that respondents and not the contractors are the motivating force of its production is the significant operative fact in this case.

The Director's opinion further attempts to support the conclusion that respondents are not "engaged in the business of mining coal" by the assertion that respondents do not pay the cost of mining the coal. He says:

> "It is significant that applicants do not pay the costs of mining this coal. Virtually all costs are borne by the contractors. Thus the major item of cost, wages for labor, is paid by the contractors * * *. Thus the contractors * * * at their sole expense, perform all service [illegible] work and furnish all labor, materials, supplies, machinery and equipment necessary or convenient for the performance of all the work * * *. And as a necessary result of this the risk of profit or loss incurred in mining the coal is assumed by the contractor." (R. p. 548).

This conclusion is not supported by any evidence in the record.

While it is true that the contractors bear all costs in the first instance, the fact is, as the Circuit Court

of Appeals held, that respondents are obligated by the contracts to pay all the costs of operation to their contractors except such as are within the contractors' control.* The expense of operation of each of the mines is met with funds paid by respondents to the contractor under the contracts for the work and service performed by the contractor, and such payments by respondents constitute the only source of revenue of the contractor from the operatoin of these mines.

The compensation paid by respondents for work and service performed by the contractor is in each case based on and fixed with reference to the costs of operation of the mine plus a reasonable compensation to the contractor. All of the contracts provide for adjustment in the compensation paid the contractor to cover increases or decreases in the major items of cost referred to by the Director as borne by the contractor, including specifically wages for labor, the expense of materials and supplies, and social security and other taxes where the increase in such cost is beyond the control of the contractor. Exhibit "B" (R. p. 310) to the operating contracts† is perfectly explicit on this point and it is difficult to perceive how the Director overlooked or misconceived the effect of its obligations. The risk of profit or loss, therefore, insofar as it may be affected by such major items of expense, is borne by respondents and not by the contractors. This is substantiated by the material increases in the rate of compensation at each of the mines referred to above (R. pp. 292, 299, 131, 88, 272, 538, 540, 543). Supra, p. 9.

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* As to costs within the contractor's control, the railroad has and exercises the power of supervision. Supra, p. 46.

† All the contracts contain substantially identical provisions.

The completely erroneous conclusion that respondents do not pay the costs of mining pervades the entire opinion of the Director. Thus, in his opinion (R. p. 549), he states that the contractors "are paid a fixed sum per ton for coal of the specified quality." As pointed out, it is not true in the final sense that the contractors are paid a fixed sum per ton, except with reference to all the major cost factors as they may be fixed at any particular time. The sum is fixed only when and so long as the items of cost of mining the coal which are beyond the control of the contractor remain fixed and it is, of course, true, as pointed out by the Director, that the major costs of mining are reflected by wage scales, taxes and other costs which are variable and are not within the control of the individual operator. These costs are therefore paid by the railroad and not by the contractor, and the Director's finding as to this is without any support in the record. In every real sense respondents are responsible for and have undertaken the risks involved in the production of the coal, and they are "in the business" up to their ears.

In support of the contention that the Director's finding that respondents are not the producers of the coal is correct, petitioners argue that respondents differ from the "typical consumer only in that they hold leases on the coal lands and pay royalties directly to the lessor" (Brief, p. 28), and that "respondents are simply consumers who pay for the coal and its production separately instead of paying one price for both." (Brief, p. 29). The "only difference" is that here the consumer consumes his own coal! As for the assertion (p. 28) that respondents have "no investment risk"

in the mineral rights which they own, if that were a persuasive criterion here it would certainly exclude the contractors as producers, since they have no interest whatever in the lands or the coal. Moreover, it is not true. Respondents are firmly obligated to pay minimum royalties in the very substantial amount of $29,000 per annum, as found by the Director (R. p. 545). Petitioners say this is not a risk because the leases are cancellable, but this overlooks the practical aspects of the situation here. The railroad is unable to take advantage of temporary price declines because obviously it could not afford to give up its captive mines merely to enable it to speculate on the permanence of a low spot market. This is demonstrated by the fact that the railroad still has the mines, although for long periods since it acquired them the market price for similar coals has been substantially less than the amounts paid to the contractors under these contracts. For instance, during the year 1937, and for ten months of 1938, the average net realization by commercial mines was more than 11 cents a ton below the cost of production.*

Petitioners have totally overlooked, moreover, an intensely practicaly and vitally important consideration underlying the operation of these mines by the respondents, and that is the imperative necessity of a stable, controlled and assured supply of coal of a known and acceptable quality to a large interstate railroad. A railroad, as is well known, cannot continually shift from one type or grade of coal to another without encountering financial and operating difficulties

* Third Annual Report under the Bituminous Coal Act of 1937, pp. 4, 5; G. P. O. 1940.

resulting from the necessity of making changes in locomotive blowers, grates, etc., and from the variable performance of engines using different coals.* Railroads do not and cannot buy "spot coal" in any appreciable quantities, and they cannot leave themselves in a position where they would have to shop around for fuel with which to keep the trains running.

The saving of costs by a bankrupt carrier is obviously a major consideration, but this motive, which is apparently viewed with suspicion and distrust by petitioners, should not be allowed to obscure other important reasons for the arrangement here attacked.

The entire argument completely ignores the vital fact that unlike the "typical consumer" (whatever that means) who buys his coal from a producer who owns the coal, has the legal right to sell it and mines and sells it in his own right and for his own account, in the case at bar the contractor does not own the coal and does not and can not in his own right and for his own account sell or otherwise dispose of it. He is entitled to

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* See testimony of Dr. C. S. Duncan before subcommittee of House Ways and Means Committee, July 26, 1935, hearings on H. R. 8479, "Stabilization of Bituminous Coal Mining Industry," G. P. O. 1935, p. 470:

> "Gentlemen, as to captive mines, if I may take some further time to give my view on that, in 1924 the railroads owned and were operating 135 such mines and produced that year about 27,000,000 tons of coal. The railroads have captive mines because the cost of fuel is an important item to them, amounting to around 6½ percent of their operating expenses. They have a discriminating demand for coal, differing for freight service from that of passenger service, and its other uses in shops. They must continuously have an adequate supply of the right kind of coal, and frequently the annual demand for a certain kind of coal will vary within a year as much as 250 percent.
>
> "And furthermore, the railroads having a constant kind of demand for coal, find that they do not need the preparation given for general commercial coal in sizing, screening, and so forth."

See also statement of Thomas Moses, ibid., p. 300.

mine it only because employed by respondents for that purpose, and can mine only at such times and in such quantities as he may be directed by the railroad. He cannot and does not in his own right or for his own account sell or otherwise "dispose of" the coal to respondents, the consumers, who are the sole owners of the coal and who alone have the right to dispose of it. While the compensation paid by respondents to the contractors for their service in mining and loading the coal is a part of the cost to respondents of the coal produced at the mines and consumed by them, it is in no sense and cannot by any play on words be converted into a "purchase price" for the coal.

No sale or other transfer of title to the coal by the producer occurred or could occur.

The facts disclosed by the record do not warrant any finding that a sale or other transfer of title to the coal *by the producer* occurs. The evidence (R. pp. 71, 83, 87, 97, 126, 163, 205, 241, 534, 539, 541) is clear, unequivocal, uncontradicted and conclusive that respondents own the coal both before and after severance* and that the contractor has no title or interest in the coal, no right or power to sell or otherwise transfer title thereto or to consume, use or otherwise dispose of the coal. Title to the coal vests, at least from the instant of removal, in respondents and they are the sole motivating force in mining the coal. The contractors are entitled to mine the coal only by reason of

* Whether respondents actually own the coal in place, under the law of West Virginia, is not material here, since they absolutely control it as against all persons. Exclusive mining rights of this kind are the equivalent of and are ~~universally~~ generally regarded as ownership.

their employment by respondents to mine it (R. pp. 70, 536, 540, 542).

References on pages 4 and 5 of petitioners' brief to D. H. Pritchard as President of Chilton Block Coal Company, to ownership by his wife of a controlling interest in the stock of that company and to acquisition by respondents of the right to mine the coal at that mine by a *sub-lease* from Chilton Block Coal Company are, if relevant at all, which we deny, apparently designed to convey the implication that in legal effect some sale or transfer of title to the coal by the contractor occurs. This reference to a *sub-lease* of such mining rights by Chilton Block Coal Company to respondents is misleading and wholly erroneous. Respondents' title and right to the coal at this mine is not derived by *sub-lease* from Chilton Block Coal Company but by assignment and transfer of the original lease, assented to by Dingess-Rum Coal Company, the landowner, and whereunder respondents acquired the exclusive right to mine coal at this mine from and in direct privity with the landowner and became responsible directly to the landowner for the royalty payments and for compliance with the other terms and provisions of the lease (R. pp. 240, 241).

In such circumstances and under elementary legal principles Chilton Block Coal Company was thereupon divested of all of its former title and interest in the coal here involved at this mine and the title or interest in the coal vested in respondents by grant from and in direct privity with Dingess-Rum Coal Company, the landowner, and the assignment with consent had the legal effect of imposing upon the respondents all the burdens of the lease. 2 R. C. L.,

pp. 625, 626, and cases cited, including *Atlantic & N. C. R. Co.* v. *Atlantic & N. C. Co.*, 147 N. C. 368.

In the note appended to page 5 of their brief, and in the apparent effort to give some color to their argument that the transactions at the William-Ann mine involved in effect some sale or transfer of title to the coal by the contractor, petitioners refer to a lease bearing the same date as the lease to respondents from the landowners to D. H. Pritchard, to begin immediately upon the termination of the lease by the landowners to respondents. In that note petitioners assert that such lease to Pritchard was made "in order to induce the lessors (landowners) to make a short term lease with respondents." There is no evidence in the record to support the assertion that the lease to Pritchard was made for any such purpose, and it is not a fact. The testimony of Mr. Tynes, Vice-President of United Thacker Coal Company (R. pp. 138, 139, 140 and 141) effectually refutes such assertion and shows clearly that the landowners made the lease to respondents because of their belief that it was a desirable and amply secure business arrangement and risk and that their motive in making the lease to Pritchard (of which lease respondents had at the time no knowledge or information and in the negotiation of which they did not participate, R. p. 139), was to insure operation of the mine after a possible termination of the lease to respondents and for the estimated period of time before the supply of unmined coal under the lands would be exhausted. The lease from the landowners to Pritchard was expressly made subject and subordinate to the

lease to respondents and any extensions or renewals thereof (R. p. 139).

Obviously the motive of the landowners in making the lease to Pritchard can have no possible bearing and in no way support the contention by petitioners that a sale or transfer of title to the coal here involved by the contractor occurred.

The Director's determination that respondents are not producers of the coal, within the meaning and intent of Section 4-II(l), was not supported by any evidence, and was and is plainly erroneous as a matter of law.

The operating arrangements whereby the railroad mines its coal are in furtherance of and not contrary to the remedial purposes of the Act.

We do not understand very clearly the argument (Brief, pp. 32-33) that an affirmance of the decision of the Circuit Court of Appeals will disrupt the beneficent scheme of the Act. Apparently it is feared that a sort of system of chattel slavery will ensue, under which skilled mine operators will be bought and sold by the head. They will sell themselves to the owners or lessees of coal lands "at prices still depressed by the oversupply of the market" (Brief, p. 35), and will be "tied indefinitely to powerful consumers" p. 36). The Malthusian principle of "overplus of blossom" will flood the land with carloads of distress independent contractors, awaiting sales to large consumers at less than cost.

To come back through the looking-glass, we invite a brief review of the familiar condition of the industry

which gave rise to the Bituminous Coal Act. These conditions were described in detail in *Appalachian Coals* v. *U. S.*, 288 U. S. 344, 361-364, and they embraced the effects of the introduction of substitute fuels, the sale of "distress coal," the shipment of unsold coal, "pyramiding," and divers sharp and unfair competitive practices, resulting in the sale of coal throughout the country at less than the cost of production. As the Bituminous Coal Commission* said:

> "This situation threatened to repeat the grave consequences which prices below costs have frequently had before in the industry. The money losses lead to widespread bankruptcy, impoverishment of workers and of mining communities, and shrinkage in local tax revenues. Such consequences in one of the Nation's largest industries tend to spread their retarding effect throughout not only the food, clothing, and mine-supplying industries, but into the whole national economy.
>
> "It was to meet such a situation, recurrent through the 1920's and threatening to follow from the collapse of prices at the end of the National Industrial Recovery program, that Congress enacted the Bituminous Coal Act of 1937 in order to place a flooring under coal prices.
>
> "The means adopted by Congress to stabilize the industry is through a system of minimum prices, f.o.b. transportation facilities at the mines, governing code members in the sale of their coal. The minimum prices are supplemented by standards of fair competition to be

* Third Annual Report, supra, at p. 5.

> observed by Code members and by rules and regulations governing the marketing of their coal."

The remedy was to support the price which operators would obtain, not for their services, but for "*their coal.*" Nowhere in all the literature on the subject†, so far as we are aware, is there any responsible assertion that captive production was a ponderable factor in the problem. Indeed, it is and must necessarily be excluded from any analysis of the condition of the industry. As the Commission said (ibid., p. 4):

> "This statement of losses is based on the operations of the established commercial mines. It does not include the so-called" captive mines," affiliated with the consumers, whose income accounts are hardly indicative of conditions among the commercially competitive mines."*

None of the unfortunate conditions which have been prevalent in the commercial coal industry can exist with respect to the operations here involved. The contracts assure the payment by the railroad of every cost of operation, plus reasonable compensation to the contractor. Stable and continuous production in accordance with the needs of the railroad is provided, carrying with it the uninterrupted employment of labor at rates of pay established through collective bargaining. No over-supplied market, no distress coal, no

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† Collected in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 395, 396. See also *Rostow*, "*Bituminous Coal and the Public Interest*," 50 Yale L. J. 543 (February, 1941).

* Thus in *Appalachian Coals* v. *U. S.*, 288 U. S. 344, 357, captive tonnage was excluded in calculating the proportion of total production controlled by members of the association.

shipments of unconsigned coal in search of a remote and unknown buyer, no sharp competitive practices are possible. Not one of the objects of Congressional solicitude is present.

In this situation it is absurd to say that producers will surrender their "independence and mobility" (p. 36)*, and indenture themselves to consumers at "depressed prices." The contracts in this case are renewable for periods of three or four years at the option of the railroad. It is inconceivable that any operator would offer to take such a contract unless it bound the coal owner to pay all the costs, as these contracts do, in addition to reasonable compensation for his managerial services.

So long as the machinery established by the Bituminous Coal Act functions to fix the prices for commercial coal at levels which will yield a return above the cost of production, the evils of depressed prices and unfair competitive practices cannot exist and there can be no economic "pressure" by consumers, large or small, which can result in lowered wages or other detrimental social conditions. The argument addressed against the methods of production adopted by the respondents could be made with equal pertinence against any captive production whether carried on by the consumer-owner in person or by employees. It is obviously true that as captive production increases, the demand for coal on the open market declines. It

* We call attention to the inconsistency of this argument with petitioners' assertion (pp. 39, 40) that the contractors are engaged in "entirely separate business enterprises," and that "they operate on their own account and for their own benefit, and are in no respect subject to respondents' control in the conduct of the mining business." Of course these last statements are utterly at variance with the actual situation disclosed by the record.

is equally obvious, however, that captive production cannot produce the evils sought to be reached by this legislation and that it was expressly excluded from the scope and operation of the statute.

The Act is not intended and does not purport to fix the wages or compensation which the owner of coal in the ground must pay for the service of extracting it for his own use, and any criticism of such arrangements must be presented to Congress and not to this Court.

IV.

The Act, if construed to apply to the leases and contractual arrangements hereunder, is beyond the power of Congress under Article I, Section 8, Clause 3 of the Constitution, and is a violation of the due process clause of the Fifth Amendment.

Petitioners state (Brief, p. 50) that the effect of a denial of the exemption will not be to compel the respondents to pay to their contractors minimum or Code prices fixed pursuant to the Act for commercial sales, but say that respondents will be entitled to allocate the price paid among the various persons entitled to share therein. The effect of an attempt to thus split an amount of money fixed by reference to the Code price between the landowner and the contractor would be to assert the regulatory power of Congress over (a) the royalty contract between the fee owner and the railroad, and (b) the contract for the compensation of the contractor for his services in extracting the coal. While it seems obvious to us (it was equally plain to the Circuit Court of Appeals) that the Act does not in any sense purport to regulate either the consideration paid for the acquisition of coal in the ground or compensation for the service of mining, it is submitted that if the Act be so construed then it is in both aspects beyond the power of the Congress under the commerce clause. Insofar as Congress might otherwise have the power to regulate royalty payments in coal leases or the compensation for service contracts under the commerce clause, if the present Act be construed as exerting such power it is arbitrary and would deprive respondents of their liberty and property without

due process of law, in violation of the Fifth Amendment.

(i) *Congress has no power under the commerce clause to regulate the price paid for the service of mining coal, or the consideration for a conveyance of land or mining rights.*

We do not understand that the recognition by the Supreme Court in recent cases of the broad power of Congress to regulate commercial transactions in or directly affecting interstate commerce has in any way impaired the established principle that the function of mining in and of itself is not interstate commerce.* *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 178; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259, 260.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, this Court said:

> "We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purpose of trade.' Plainly the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. * * *"
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> * * *
>
> "Extraction of the coal from the mine is the aim and completed result of local activities. Commerce in the coal mined is not brought

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* Cf. *City of Atlanta* v. *National Bituminous Coal Commission*, 26 Fed. Sup. 606 (D. C., D. of Col.) February, 1939, dismissed without opinion 308 U. S. 517, at page 608, where, in rejecting the contention of the City that Congress had no power to fix prices for bituminous coal, the lower court said: "Consequently the challenge to the exercise of Federal power must be considered in the light of this concession *and of the well-established law that although the production of coal in and of itself may not constitute interstate commerce* the sale and shipment of that coal, or the contracting to sell and ship to customers in another State does." (Emphasis supplied.)

> into being by the force of these activities, but by negotiations, agreements and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it."

We do not understand that the *Sunshine* case† purports to overrule the traditional view, which was reiterated in the *Carter* case, that the mere operation of mining coal in and of itself is an intrastate activity not subject to regulation by Congress. The Act is now sustained as a legitimate regulation, not of coal mining or leases, but of commerce in coal. Thus reliance is placed upon the statement in the dissenting opinion in the *Carter* case of Mr. Justice Cardozo that "to regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences." The *Carter* case is simply distinguished as not pertinent to the regulation now attempted. The opinion says: "There is nothing in the *Carter* case which stands in the way. The majority of the Court in that case did not pass on the price-fixing features of the earlier Act. The Chief Justice and Mr. Justice Cardozo, in separate minority opinions, expressed the view that the price-fixing features of the earlier Act were constitutional. We rest on their conclusions for sustaining the present Act." (310 U. S., at 397, 398).

In re-enacting (with immaterial modifications) the provisions of the Guffey Act regulating commercial transactions in coal, Congress recognized the validity of the Court's holding in the *Carter* case that those

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†310 U. S. 381.

portions of the Act which attempted to regulate the mere production of coal as such through the regulation of wages, hours and working conditions, was invalid as an invasion of the province of the States. No attempt was made in the present Act to assert any power over these matters, and a construction of the price regulatory provisions which would operate, as proposed by the Director in this case, to regulate not sales or prices but the actual operation of mining, would run counter to the constitutional limitation recognized in the *Carter* case, the *Oliver Iron Mining Co.* case, the *Heisler* case and others, and acquiesced in by the Congress when it omitted the labor provisions of the original legislation. It cannot be presumed that Congress intended by indirection and implication to regulate the service and function of extracting the coal apart from any commercial sale, but if such be the construction of the Act it goes beyond the commerce power.

Currin v. *Wallace*, 306 U. S. 1, is cited by the Director in support of the constitutionality of his application of the Act (R. p. 551). This case sustained the validity of the Tobacco Inspection Act of 1935 against the objection that it was beyond the power of Congress under the commerce clause. But in that case the Court was careful to point out that the Act applies only to commercial transactions involving the sale of tobacco in interstate commerce. The Act is a regulation of marketing practices which directly involve sales in interstate and foreign commerce and is the same type of regulation sustained in a long line of cases beginning with *Stafford* v. *Wallace*, 258 U. S. 495.

It is undeniably true that this Court has, in *U. S.*

v. *Darby Lumber Co.*, No. 82, present term, recognized the power of Congress to deal directly with matters commonly regarded as of local concern, as a proper means of regulating interstate commerce. It is axiomatic, however, that the validity of a particular regulation depends upon the nature of the Congressional objective sought to be attained and the presence of a logical and reasonable connection between the regulation and the objective.

The means chosen must be appropriate to the end sought.*

As this Court has said, "It is obvious that the commerce power is as much dependent upon the type of regulation as its subject matter." *Virginian Ry. Co.* v. *System Federation*, No. 40, 300 U. S. 515, 557.

Even assuming that Congress could, after investigation and upon proper legislative findings, enact appropriate legislation with respect to the lease or production of coal as such, upon a showing that these activities had a direct effect upon the movement and character of interstate trade, no such investigation has been had. The effect of consumer production by means of leases and mining contracts has not been discussed or debated, there has been no Congressional finding as to the necessity for any such Federal regulation, and no discussion of or finding as to the type of regulation which might be appropriate. Insofar as the matter has been adverted to at all, every conclusion has been in the negative, *i. e.*, that coal produced under the control of a consumer who owns it or has the exclusive

* *Railroad Retirement Board* v. *Alton Ry.*, 295 U. S. 330, 362, 368; *Nebbia* v. *New York*, 291 U. S. 502, 525, 537.

right to extract it while in place does not and cannot have any effect upon the commercial problems which have had the attention of the Congress.

The argument of petitioners on this point (Brief, pp. 49-52) largely begs the question by treating it simply as a matter of price-fixing. This approach involves the basic error of failing to distinguish between the price of an article of trade and the cost of reducing to possession something already owned or controlled. The assertion that regulation of the payment for services or royalties "bears a close relation to the fixing of interestate prices" is self-contradictory in this case, since there are no prices here to be fixed. The question is whether in the absence of sales or prices Congress can go "back to the land" and regulate something else—the compensation for personal services and the consideration for the conveyance of an interest in land.

A connection between this lease-service arrangement and commerce is said to lie in "competition" between the two, for the reason that "if producers can dispose of their coal" in this way, "they will obtain an advantage over their competitors who comply with prices established under the Act (Brief, p. 50). Again we point out that, assuming the contractors to be "producers" in some sense, it is not *their coal*, and they have nothing in the way of a commercial article to "dispose of." They cannot therefore possible be in competition with those who sell coal. The railroad here, as in the case of any captive producer, has simply withdrawn this coal, and, to the extent of its production, its own demand, from the market, and the contractors have withdrawn from production and from commerce. They are merely managing an ac-

tivity for the railroad, as a part and in furtherance of its operations.

(ii) *The Act, if construed to regulate the royalty payments or operating contracts here involved, would violate the Fifth Amendment.*

If the Act could be construed as authorizing the piecemeal regulation of the royalty provisions of the lease contracts and the compensation for services under the operating agreements as asserted by petitioners, the result would be an arbitrary interference with the Receivers' freedom of contract and would deprive them of their property without due process of law, in that the attempted interference would be totally unrelated to any legitimate end which the Congress has the power to achieve or which it has sought to achieve by the Act. The declared purpose of the Act and its entire regulatory scheme is aimed at "the sale and distribution in interstate commerce of bituminous coal." The Act sets up no standards for the guidance of its administrators in regulating or controlling the compensation of fee owners or of mining contractors. Even if the Act authorized the application here attempted, the application would bear no reasonable relation to the end sought to be achieved in the Act or to any other legitimate aim of Congress. The regulation of the service contracts or of the royalty agreements here involved could not possibly have any tangible effect upon market prices generally nor upon competitive practices in the commercial coal industry.

The effect of an attempt to increase the amount to be paid by the Receivers, either to the contractor or to

the landowners would simply arbitrarily take money from the receivership estate and give it to the contractors or landowners without thereby accomplishing any tangible or legitimate regulatory end, thus depriving the Receivers of both the liberty of contract and of their property without due process of law. Any attempt to require the Receivers to divide between the landowner and the contractor an amount of money which has been fixed by the Director with reference to royalty transactions between other parties, the cost of operating other mines, taxes, depreciation, and depletion allowances, and selling and administrative costs involved in the operation of numerous coal businesses by other people (Sec. 4-II(a)) which are not present as elements of cost in any aspect of the transactions involved on this record would be too plainly arbitrary to require elaboration of argument to demonstrate its invalidity. Such a requirement would necessarily result either in depriving the Receivers of the excess value of the coal in place over the amount which they have agreed to pay as royalties, or would compel them to pay for the personal and local services of the contractor in extracting the coal amounts in excess of those agreed upon, or it would have both of these arbitrary and confiscatory effects. No such result is possible under the Constitution.

To hold, as the Director has held here, that an owner or lease-holder of coal lands must pay a contractor hired to dig his coal an amount based upon calculation of a minimum fair price for coal as a merchantable commodity, leaving unregulated the wages, salaries and other production costs of the owner who digs his coal through agents or servants of a

different legal description, would also be a discrimination unwarranted by any Congressional finding or mandate either in being or potential.

The result would be a windfall to the contractor or the landowner, or both, in an amount approximating one hundred and fifty thousand dollars a year, when both have admittedly already received full compensation according to their agreements. The huge amounts which they would receive would constitute net income to them, and would be taken from an interstate public utility which is unable to pay its debts. We are confident that this Court will never approve the accomplishment of such a crushing injustice.

Respectfully submitted,

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